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CRIMINAL JUSTICE TRAINING

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LEADERSHIP INSTITUTE BRANCH

LEGAL TRAINING SECTION

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

SUPREME COURT OF THE UNITED STATES
2013-2014 TERM

The full text of all opinions may be found at www.supremecourt.gov.

42 U.S.C. §1983 – EXIGENT ENTRY

Stanton v. Sims, 134 S.Ct. 3 (2013)
Decided November 4, 2013

FACTS: On May 27, 2008, Officer Stanton and his partner (La Mesa, CA, PD) responded to an "unknown disturbance" involving a subject with a baseball bat. Officer Stanton was familiar with the gang violence associated with the area. The two officers, uniformed and in a marked vehicle, approached the location and spotted three men walking in the street. When the men saw the officers, two of then "turned into a nearby apartment complex." The third, Patrick, crossed the street 75 feet in front of the cruiser and "ran or quickly walked toward a residence." That residence belonged to Sims.

Officer Stanton considered Patrick's actions suspicious and got out to detain him. He called out "police" and "ordered Patrick to stop in a voice loud enough for all in the area to hear." Patrick looked toward the officer "ignored his lawful orders," and went into the front yard, through a gate. When the gate closed, the six-foot-high privacy fence, blocked Officer Stanton's view. The officer believed Patrick had committed a misdemeanor under California law, by failing to stop, and he also feared for his own safety.[1] He "made the 'split-second decision' to kick open the gate in pursuit of Patrick." Unfortunately, Sims was, herself, standing behind the gate when he did so, and she was struck by the "swinging gate," suffering a head and shoulder injury.

Sims filed suit against Officer Patrick under 42 U.S.C. §1983, for his entry into her property. The District Court ruled in Stanton's favor, finding the entry to be justified "by the potentially dangerous situation." (The court also agreed that even if a constitutional violation did occur, the officer was entitled to qualified immunity "because no clearly established law put him on notice that his conduct was unconstitutional." Sims appealed, and the Ninth Circuit Court of Appeals reversed, ruling that Sims was "entitled to the same expectation of privacy in her curtilage as in her home itself, because there was no immediate danger, and because Patrick had committed only the minor offense of disobeying a police officer." Further, the appellate court agreed that was clearly established and as such, the officer was not entitled to qualified immunity.

Stanton appealed and the U.S. Supreme Court granted certiorari.

[1] Kentucky does not have a clearly equivalent statute.

ISSUE: If the law is not settled on a particular issue and the officer act in a manner not "plainly incompetent," is the officer entitled to qualified immunity?

HOLDING: Yes

DISCUSSION: The Court noted, initially, that the law was clearly not settled on the issue of when a pursuit into a curtilage might be warranted when the underlying offense is relatively minor at the time. The Court noted that under Ashcroft v. al-Kidd, qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law."[2] In this case, the Court agreed that there was no suggestion that Officer Stanton "knowingly violated the Constitution," the question being whether he was "plainly incompetent" in his decisionmaking. The Court noted that the Ninth Circuit concluded that he was, "despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect."

The Ninth Circuit had looked to two cases, Welsh v. Wisconsin[3] and U.S. v. Johnson.[4] In Welsh, however, the Court agreed that no "hot pursuit" had actually occurred, the officers had gone to his home at some time later, entered without a warrant or consent, and made an arrest for a nonjailable traffic offense. The Court had agreed that "application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned," but agreed that it "did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is 'usually' required." Johnson, also, did not involve a hot pursuit, as the subject had escaped some 30 minutes earlier. The Court agreed that the Ninth Circuit read both cases "too broadly," in that neither case involved a hot pursuit. Curiously, the Court noted, the Ninth Circuit cited U.S. v. Santana[5] with approval, a case in which the officer made a warrantless entry while in hot pursuit. (Although Santana involved a felony, the Court expressly did not limit its holding on that fact.)

The Court emphasized, it "held not that warrantless entry to arrest a misdemeanor is never justified, but only that such entry should be rare." In fact, the Court cited to two California state court cases that held "where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant."[6] The Court found it "especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent –

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[2] 563 U.S. --- (2011); see also Malley v. Briggs, 475 U.S. 335 (1986).
[3] 466 U.S. 740 (1984).
[4] 256 F.3d 895 (2001).
[5] 427 U.S. 38 (1976).
[6] People v. Lloyd, 265 Cal. Rptr. 422 (1989); also cited In re Lavoyne M., 270 Cal. Rptr. 394 (1990).

and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where he acted."

The Court concluded that it did not "express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional." It ruled, instead, that the officer *may* have been mistaken in his belief, but he was not "plainly incompetent." As such, he was entitled to qualified immunity.

The U.S. Supreme Court reversed the decision of the Ninth Circuit and remanded the case for further proceedings.

TRIAL PROCEDURE

Kansas v. Cheever, 134 S.Ct. 596 (2013)
Decided December 11, 2013

FACTS: On January 19, 2005, Cheever shot and killed Sheriff Matthew Samuels (Greenwood County, Kansas). In the hours before the shooting, he and friends had cooked and smoked methamphetamine. When they were alerted that law enforcement was on the way to arrest him on an unrelated matter, he tried to flee, but found that his car had a flat tire. Instead, he and a friend hid upstairs, with a loaded pistol. When he heard footsteps coming up the stairs, he stepped out and shot Sheriff Samuels. He stepped back into the bedroom and then, "walked back to the staircase and shot Samuels again.) Although he fired at other officers, only Samuels was hit.

Kansas charged Cheever with capital murder. Shortly thereafter, the Kansas Supreme Court had found the death penalty scheme unconstitutional, so the prosecution dismissed their own charges and allowed the federal authorities to prosecute Cheever under the Federal Death Penalty Act of 1994.[7] In that proceeding, he gave notice that he intended to raise the defense that he was intoxicated on methamphetamine at the time of the shooting, so much so that he could not have formed the specific intent needed under the charge. He was ordered to undergo a psychiatric examination.

During a postponement in the proceedings, the Kansas Supreme Court ruled that the death penalty was, indeed, constitutional in Kansas and Kansas brought a second prosecution against Cheever. (He was never tried under federal law.) There he also "presented a voluntary-intoxication defense," arguing his methamphetamine use had made him "incapable of premeditation." Testimony was presented that he has suffered brain damage due to long term methamphetamine abuse. Kansas attempted to rebut this testimony using the psychiatrist who had examined him while the case was in federal court. Cheever objected, arguing that this violated the Fifth Amendment's Self-

[7] 18 U.S.C. §3591 et seq.

Incrimination Clause, as he'd not agreed to the examination. The trial court permitted it, however, noting that even the defense expert had used the report in coming to his conclusion.

Cheever was convicted of murder and attempted murder, and sentenced to death. He appealed first to the Kansas Supreme Court, which ruled in his favor, agreeing that using the information from the court-ordered examination violated his rights.

Kansas appealed and the U.S. Supreme Court granted review.

ISSUE: May the prosecution use a court-ordered psychiatric examination to rebut evidence of the mental status of the defendant?

HOLDING: Yes

DISCUSSION: The Court, as did the Kansas courts, first looked to Estelle v. Smith, in which a prior U.S. Supreme Court had ruled that "a court-ordered psychiatric examination violated the defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute at trial."[8] However, in Buchanan v. Kentucky, a later Court had agreed that "a State may introduce the results of a court-ordered mental examination for the limited purpose of rebutting a mental-status defense."[9]

In this case, the Court agreed, "where a defense expert who has examined the defendant testifies that a defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal." In this case, the "State permissibly followed where the defense led." Further, the Court noted that although voluntary intoxication is not a "mental disease or defect," as narrowly defined in Kansas, that the Court had a broader view of the term and felt it appropriate to allow a "mental status" defense – as Cheever was in this case. (Kansas had declined to apply Buchanan because it ruled that Cheever's intoxication was a temporary state, not a permanent one.) The Court agreed that "Cheever's psychiatric evidence concerned his mental status because he used it to argue that he lacked the requisite mental capacity to premeditate." The Court agreed that such testimony is limited, however. Since Kansas did not address the issue as to whether the expert exceeded the scope of rebuttal, the Court declined to address it either.

The Court vacated the decision of the Kansas Supreme Court (which overturned Cheever's conviction) and remanded the case for further proceedings.

[8] 451 U.S. 454 (1981).
[9] 488 U.S. 402 (1987).

TRIAL PROCEDURE – SENTENCING

Burrage v. U.S., 134 S.Ct. 881 (2014)
Decided January 27, 2014

FACTS: On April 15, 2010, a long time drug user, died following an extended drug binge. Starting the day before, he had started with marijuana, moved on to injecting crushed oxycodone, and then met Burrage and purchased heroin. Banks' wife found him dead the next morning. A search of the couple's home revealed a variety of drugs, including heroin.

Burrage was charged with distributing heroin, and specifically with causing a death resulting from the use of the heroin. At trial, medical experts testified that multiple drugs were present in Banks' system, but only morphine (metabolized from the heroin) was above the therapeutic range. Both doctors testified that the heroin was a factor that contributed to the overall effect that led to Banks' death. Specifically, his death was attributed to "mixed drug intoxication."

Burrage argued at trial that there was no evidence "that heroin was a but-for cause of death." The Court declined to offer requested instructions to the jury which would have required the prosecution to offer proof that the heroin was the proximate cause of his death. Instead the court allowed the jury to consider the heroin to be a "contributing cause." Burrage was convicted.

Burrage appealed to the Eighth Circuit, which affirmed his convictions. Burrage requested certiorari from the U.S. Supreme Court.

ISSUE: To support an enhanced penalty under federal law, is it necessary to prove that a drug distributed by the defendant is the proximate cause of another's death?

HOLDING: Yes

DISCUSSION: Proof that an individual died – the "death result enhancement" – as a result of drug trafficking is used under federal law to increase a sentence for distribution. The Court noted that the "but-for requirement is part of the common understanding of cause" under federal jurisprudence. It agreed that "it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter." When nothing says otherwise, the courts have "regular read phrases like 'results from' to require but-for causality." The Court agreed that " a phrase such as 'results from' imposes a requirement of but-for causation." Despite the prosecution's argument that "distinctive problems associated with drug overdoses

counsel in favor of dispensing with the usual but-for causation requirement," since "addicts often take drugs in combination."[10]

The Court concluded that "where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury," the defendant cannot be subjected to the penalty enhancement. The Court reversed Burrage's sentence and remanded the case for further proceedings.

SEARCH & SEIZURE - CONSENT

Fernandez v. California, 134 S.Ct. 1126 (2014)
Decided February 25, 2014

FACTS: In October 2009, in Los Angeles, Fernandez approached Lopez and told him that he was in the territory of the Drifters gang. He pulled out a knife and Lopez ended up cut on the wrist. He fled the scene and called 911 for help, but he was attacked by four men and robbed of his cell phone and wallet, and $400 cash. Two LAPD officers responded and drove down an alley frequented by the Drifters. A man "who appeared scared" walked past them and said "[t]he guy is in the apartment." The officers spotted a man run into the building indicated. A minute later, they "heard sounds of screaming and fighting coming from that building."

With backup's arrival, the officers knocked on the door. Roxanne Rojas answered the door; she was "holding a baby and appeared to be crying." She had blood and her shirt and an apparently injured hand. Her face was reddened and had a "large bump on her nose." She said she'd been in a fight. Officer Cirrito asked if anyone else was inside, and she said her son (age 4) was there. He asked her to step outside so he could do a protective sweep. Fernandez appeared, wearing only boxers. He was agitated and said "You don't have any right to come in here. I know my rights." Suspecting he'd assaulted Rojas, he was removed and arrested. Lopez then identified him as one of his attackers as well. He was then taken to jail. About an hour later, Det. Clark returned and told Rojas what had happened. He received oral and written consent to search. They found gang paraphernalia, a butterfly knife, clothing identified by Lopez and ammunition. Rojas' son showed them a sawed off shotgun.

Fernandez was charged with robbery, possession of a firearm by a felon and related federal firearms charges. He moved to suppress, but was denied. He pled nolo contendere (no contest) to the firearms charges. He was convicted at trial of the robbery and another related charge. The California appellate courts affirmed. He requested certiorari from the U.S. Supreme Court, which granted review.

[10] Statistics gathered from one federal agency suggest approximately 46% of drug overdose deaths involve combinations of more than one drug.

ISSUE: Does the refusal to consent to a search extend past the point at which the objecting party is removed, if another co-inhabitant gives consent later?

HOLDING: No

DISCUSSION: The Court agreed that a warrant is generally required for a home search, but that there are reasonable exceptions to that rule. One of those exceptions is consent. The Court noted that "it would be unreasonable – indeed, absurd – to require police officers to obtain a warrant when the sole owner or occupant of a house or apartment voluntarily consents to a search." Requiring a warrant under such circumstances "would needlessly inconvenience everyone involved – not only the officers and the magistrate but also the occupant of the premises, who would generally either be compelled or would feel a need to stay until the search was completed."

The Court then questioned what should be done "when there are two or more occupants? Must they all consent? Must they all be asked? Is consent by one occupant enough?

Initially, the Court faced that issue in U.S. v. Matlock,[11] holding that "the consent of one who possesses common authority against the absent, nonconsenting person with whom the authority is shared." In Illinois v. Rodriguez, the earlier holding was reaffirmed and extended, when the consent was given by a person who officers reasonable believed was a resident, but in fact, was not.[12] Although consent by "one resident of jointly owned premises" is usually enough, the court had "recognized a narrow exception to this rule in Georgia v. Randolph.[13] In that case, the Court upheld that a "physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." However, the Randolph Court 'went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present."

In the case at bar, Fernandez argued that the only reason he was not present was because he was arrested, and that his objection should have remained in effect. However, the Court noted that the dictum in Randolph did not mean that removing an occupant under a valid arrest would necessarily invalidate the search. Following the rule proposed by Fernandez would require officers to decide how long an objection should reasonably last. The Court concluded that it would take Randolph on its face, and that denying someone in the position of Rojas "the right to allow the police to enter *her* home would also show disrespect for her independence," especially when she would have reason to have all dangerous items removed from the premises. The Court agreed that "the Fourth Amendment does not give [Fernandez]" the power to control Rojas in that manner.

The Court upheld the decision of the California court.

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[11] 415 U.S. 164 (1974).
[12] 497 U.S. 177 (1990).
[13] 547 U.S. 103 (2006).

FEDERAL ASSET FORFEITURE

Kaley v. U.S., -134 U.S. 1090 (2014)
Decided February 25, 2014

FACTS; The Kaleys (Kerri and Brian) were charged with transporting stolen medical devices across state lines and laundering the money made by this crime. Immediately following their indictment, the government sought a restraining order (under 21 U.S.C. 853(e)(1)) to prevent them from "transferring any asset traceable to or involved in the alleged offenses." That included $500,000 they intended to use for legal fees. The District Court granted the request, later modifying that to except $63,000 it found was not connected to the crime. The Kaleys took an interlocutory appeal and the Eleventh Circuit reversed and remanded as to what type of evidentiary hearing was required in such cases. After a further proceeding and appeal, the Eleventh Circuit ruled that they were not entitled to a hearing on the frozen assets "to challenge the factual foundation" of the grand jury indictment.

The Kaleys requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does a federal grand jury indictment also support the seizure of assets connected to the crime?

HOLDING: Yes

DISCUSSION: The Court began by noting that it had twice considered similar claims, in Caplin & Drysdale Chartered[14] and U.S. v. Monsanto.[15] In both, it had concluded that it was permissible to seize, for example, robbery proceeds and refuse to allow them to be used to hire an attorney, even prior to conviction (or trial). The Court found that it was, after all, alright for the Government to restrain persons with only probable cause, and as such, it would be permissible to restrain property, as well. In this case, a Court had already found probable cause, and there was no contention that the funds in question were mostly derived from the crime of which they stand accused.

The Court agreed that until the standard set by Caplin and Monsanto is changed by Congress, the "Kaleys cannot challenge the grand jury's conclusion that probable cause supports the charges against them. The grand jury gets the final word."

The Court affirmed the decision of the Eleventh Circuit, upholding the freezing of the assets.

[14] 491 U.S. 617 (1989)
[15] 491 U.S. 600 (1989).

MILITARY JURISDICTION

U.S. v. Apel, 134 S.Ct. 1144 (2014)
Decided February 26, 2014

FACTS: Two California highways run through Vandenberg Air Force Base. Although both are open to the traveling public, the roads are actually located on land owned by the military, through an easement with the state. At one intersection, a location has been designated "for peaceful protests" – the base houses missile and space launch facilities. A public advisory detailed the rules for using that space, and that such protests must be scheduled in advance. Further, it notifies the public that only peaceful, authorized protests are allowed and that two weeks' notice must be given. Failure to comply with the rules might lead to ejection and barring from the property.

Apel was an antiwar activist. In March 2003, he "trespassed beyond the designated protest area and threw blood on a sign for the Base." He was convicted and barred from the base for three years, under 18 U.S.C. 1382. In May, 2007, he returned and again was barred, this time permanently, unless he followed specified procedures. The only expectation was that he could use the road to traverse the Base. He ignored the order, however, and entered the prohibited area during 2008 and 2009, and was again barred from the location. In 2010, he again trespassed three times, and was cited each time under federal law and escorted off the property.

He was convicted. He appealed, and the Ninth Circuit reversed, holding that the federal statute does not apply to the designated protest area, and that the Government does not have "exclusive right of possession" over that area. The United States requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a public roadway through a military base still under the command of the military?

HOLDING: Possibly (see discussion)

DISCUSSION: The Court noted that 1382 "is written broadly to apply to many different kinds of military places," including a "reservation, post, fort, arsenal, yard, station, or installation." The Court agreed that historically, many military places "provided services to civilians, and were open for access by them." In old west times, such bases "were often bustling communities" that attracted businesses of all types. The common feature of all is "that they have defined boundaries and are subject to the command authority of a military officer." Further, the ownership status of military sites around the world varies significantly, and many have roads running through them that are used by the public. In several ways, the Base Commander had consistently maintained authority over the designated protest area, including occasional patrols. The easement given to the state was

for the purposes of right-of-way and on occasion, the Base Commander had closed the roadway for limited times.

The Court agreed that the best reading of the statute in question "is that it reaches all property within the defined boundaries of a military place that is under the command of a military officer." The Court vacated the decision of the Ninth Circuit and remanded the case.

NOTE: The relevance of this decision applies only to those areas in Kentucky where federal military bases are located, i.e. Fort Knox and Fort Campbell.

FEDERAL FIREARMS LAW

Rosemond v. U.S., 134 S.Ct. 1240 (2014)
Decided March 5, 2014

FACTS: During a "drug deal gone bad," Perez had arranged to sell marijuana to Gonzales and Painter. Perez was accompanied by Joseph and Rosemond. During the transaction, Painter got into the backseat to inspect the marijuana. However, instead of a transaction, he punched the back seat occupant (it was unclear whether it was Joseph or Rosemond) and fled with the marijuana. At that point, "one of the male passengers – but again, which one is contested – exited the car and fired several shots." All three then gave chase, but before the "could catch their quarry," they were stopped by a responding officer.

Rosemond was charged with, among other things, a violation of 18 U.S.C. §924(c), "using a gun in connection with a drug trafficking crime, or aiding and abetting that offense." Federal law further stated that anyone who assists in such crimes may be punished in the same manner as the principal. In its prosecution, the Government proceeded on two alternative theories: that he himself fired the handgun or that he aided and abetted Joseph in doing so. Arguments were made and the jury instructed on both. Rosemond was convicted, but the jury forms did not indicate under which theory the government acted. Rosemond appealed. The Tenth Circuit Court of Appeals upheld his conviction. Rosemond requested review and the U.S. Supreme Court granted certiorari.

ISSUE: To convict of aiding or abetting in a crime involving a firearm under federal law, must the defendant be found to have been aware of the presence of the weapon by a cohort?

HOLDING: Yes

DISCUSSION: The Court looked to the statute and the line of cases that flowed from it. The Court agreed that under 18 U.S.C. §2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime."[16] The

[16] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

Court agreed that required that the person both "take an affirmative act in furtherance of that offense" and that be done, with the "intent to facilitating the offense's commission."

The court noted that he Rosemond admitted that he actively participated in a drug transaction. However, he argued he had nothing to do with the firearm or the shooting. In other words, he admitted to "one element (the drug element) of a two-element crime." The court noted that the common law crime of aiding and abetting applied to someone who "facilitated any part – even though not every part – of a criminal venture. Under the logic of the common law, "every little bit helps – and a contribution to some part of a crime aids the whole." The Courts of Appeal across the U.S. had generally agreed to that, noting that the "division of labor between two (or more) confederates thus has no significance."

In the past, the Court had "found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." By doing so, the subject "becomes responsible, in the typical way of aiders and abettors, for the conduct of others." However, the question is, the subject must know that an accomplice will, such as in this case, be carrying a gun – making a drug deal an armed crime. Without that prior knowledge, he would not have the opportunity to make a decision about participation. "But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime."

The Court noted that "what matters for purposes of gauging intent … is that the defendant has chosen, with full knowledge, to participate in the illegal scheme…." It does not matter whether "he participates with a happy heart of a sense of foreboding." The Court used an analogy:

> By virtue of §924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened states when he decided to stay in the game.

As such, the Court agreed that the jury instructions should have reflected the need for the jury to find that Rosemond "needed advance knowledge of a firearm's presence." The case was remanded back to the Tenth Circuit with the requirement that the Court look to whether the error was sufficient to overturn the conviction.

FEDERAL LAW – CRIME OF VIOLENCE

U.S. v. Castleman, 134 S.Ct. 1405 (2014)
Decided March 26, 2014

FACTS: Congress enacted 18 U.S.C. §922(g)(9) to close a "dangerous loophole" in federal gun laws. "While felons had long been barred from possessing guns, many perpetrators of domestic violence are convicted only of misdemeanors." Section 922(g)(9) provided that an individual who has been convicted of a "misdemeanor crime of domestic violence" may not possess any firearm or ammunition. A "misdemeanor crime of domestic violence" was further defined as "an offense that … (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."[17] In 2001, Castleman was charged under Tennessee law with "intentionally or knowingly caus[ing] bodily injury to" the mother of his child, to which he pled guilty. In 2008, federal authorities learned he was selling firearms on the black market. He was charged with violating §922(g)(9) and other unrelated offenses.

Castleman moved to dismissed the charge, arguing that his Tennessee conviction did not include the necessary element of "physical force" – the District Court agreed that to qualify, the crime "must entail 'violent contact with the victim.'" Upon appeal, the Sixth Circuit affirmed, "by different reasoning – finding that the degree of force is that same as required under a different statue, which defines "violent felony." The Court noted that he could have been convicted for a "slight, nonserious physical injury" from force that could not be described as violent. This decision "deepened the split of authority among the Courts of Appeal on the issue. The U.S. Supreme Court granted certiorari to resolve the split.

ISSUE: Does a minor assault that includes any degree of force qualify as a misdemeanor crime of domestic violence for federal law purposes?

HOLDING: Yes

DISCUSSION: The Court noted that under common law, the element of force is satisfied "by even the slightest offenses touching." In this case, that "common-law meaning of 'force' fits perfectly." Since the perpetrators of domestic violence are prosecuted under applicable state assault/battery statutes, "it makes sense " to use the "type of conduct that supports a common-law battery conviction." Further, while "violent" or "violence" does connote a "substantial degree of force," … "that is not true of 'domestic violence.'" Instead, that term is "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." The Court emphasized that most domestic assaults "are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." These "minor uses of force" are not usually considered

[17] 18 U.S.C. §921(a)(33)(A).

"violent," but these situations involve "the accumulation of such acts over time" that "can subject one intimate partner to the other's control."

The Court further noted that the statute groups those convicted of misdemeanor crimes of domestic violence "with others whose conduct does not warrant such a designation." In addition, to read the statute otherwise would render the federal law "inoperative in many States" – as the laws under which such situations are prosecuted fall into two categories – "those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the latter." Certainly, offensive touching does not generally entail violent force.

The Court concluded that the degree of force necessary for the crime was the same as that required to support a "common-law battery conviction." Under the Tennessee statute, not ever act alleged under the law would be a use of physical force, but in this case, he pled guilty, according to the indictment, of causing bodily injury (which must have resulted from physical force.)

The Sixth Circuit decision was reversed and the case remanded.

SEARCH & SEIZURE – TRAFFIC STOP

Navarrette v. California, 134 S.Ct. 1683 (2014)
Decided April 22, 2014

FACTS: On August 23, 2008, 911 dispatch for the California Highway Patrol (CHP) in Mendocino County, CA, received a call from the CHP dispatcher in adjacent Humboldt County. Humboldt County relayed a tip from a 911 caller, which was broadcast to CHP officers at 3:47 p.m., as follows:

> Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David- 94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.

At 4 p.m., a CHP officer heading northbound toward the area passed the truck; he made a U-turn and made the stop at 4:05 p.m. A second officer arrived on scene and the two officers approached the truck; they immediately smelled marijuana. A search of the truck revealed 40 pounds of marijuana. Navarette was driving; his passenger bore the same last name. Both were arrested.

Both moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment as it lacked reasonable suspicion. The California trial courts disagreed and upheld the stop. Both Navarettes took a conditional guilty to transporting marijuana and appealed. The California Court of Appeal affirmed the plea; the California Supreme Court denied review. The Navarettes sought certiorari to the U.S. Supreme Court, which accepted review.

ISSUE: Might an anonymous 911 caller provide sufficient information to support a traffic stop?

HOLDING: Yes

DISCUSSION: The Court began by noting that the "Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[18] Reasonable suspicion depends upon "both the content of information possessed by police and its degree of reliability."[19] Although a "mere hunch" is not enough, it requires "considerably less" than probable cause.[20]

With respect to anonymous tips, the Court noted that it had already rejected "the argument 'that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person.'"[21] A true anonymous tip, standing alone, rarely provides any information as to the "Informant's basis of knowledge or veracity" because an ordinary caller does "not provide extensive recitations of the basis of their every observations." But, under some circumstances, "an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop."

The Court contrasted its holdings in Alabama v. White[22] and Florida v. J.L.[23] In the first, it had agreed that "the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity." In the latter, however, the bare-bones tip, which essentially just placed a described suspect (allegedly with a gun) at a location, a bus stop, where people would, of course, be likely to stand. The tip provided no basis for the informant's knowledge of "concealed criminal behavior" – the gun – or any prediction of the suspect's future behavior that might be corroborated to "assess the tipster's credibility." In the latter, the Court concluded the tip was "insufficiently reliable."

In the current case, the first question is "whether the 911 call was sufficiently reliable to credit the allegation that" the Navarettes ran the caller off the road. Even "assuming for present purposes" that the call was truly anonymous, the Court found "adequate indicia of reliability" to support the stop.

> By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability.[24]

Unlike cases where the tip concerns something hidden, like drugs or firearms, this claim involved personal and direct knowledge of the subject's wrongdoing. Further, the Court continued:

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[18] U.S. v. Cortez, 449 U. S. 411 (1981); see also Terry v. Ohio, 392 U. S. 1 (1968). T
[19] Alabama v. White, 496 U. S. 325 (1990).
[20] U.S. v. Sokolow, 490 U. S. 1 (1989).
[21] Adams v. Williams, 407 U. S. 143 (1972).
[22] Supra.
[23] 529 U. S. 266 (2000)
[24] Illinois v. Gates, 462 U. S. 213 (1983)); Spinnelli v. U.S., 393 U. S. 410 (1969).

> There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." A similar rationale applies to a "statement relating to a startling event"—such as getting run off the road—"made while the declarant was under the stress of excitement that it caused." Unsurprisingly, 911 calls that would otherwise be inadmissible hearsay have often been admitted on those grounds. There was no indication that the tip in J. L. (or even in White) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.[25]

In addition, the caller used the 911 system, and most, if not all, such emergency systems include "some features that allow for identifying and tracking callers, and thus provide some safeguards against making false reports with immunity." They "can be recorded, which allows victims with an opportunity to identify the false tipster's voice and subject him to prosecution." Federal FCC mandates require cell phones to relay the phone number to 911 and most now identify the caller's "geographic location with increasing specificity." Although not perfect, it would be reasonable for an officer to "conclude that a false tipster would think twice before using such a system." The use of 911 was one of the relevant circumstances that supported the reliance of the officers.

The Court agreed, however, that "even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" The Court agreed that the reported behavior supported a reasonable suspicion of impaired/drunk driving. A number of cases supported the idea that "the accumulated experience of thousands of officers suggest that these sorts of erratic behaviors are strongly correlated with drunk driving." Not all traffic infractions do, of course, such as minor speeding or failure to use a seatbelt, but "a reliable tip alleging the dangerous behaviors" reported in this case, certainly do. "Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.[26] Further, "the experience of many officers suggests that a driver who almost strikes a vehicle or another object – the exact scenario that ordinary causes 'running off the roadway' is likely intoxicated." Although it is certainly true that it might have been caused by a momentary distraction, a finding of reasonable suspicion does not have to "rule out the possibility of innocent conduct."[27]

Finally:

> Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. . It is hardly surprising that the

[25] Internal citations removed for brevity.
[26] The Court cited to several training manuals and documents for law enforcement.
[27] U.S. v. Arvizu, 534 U.S. 266 (2002)

> appearance of a marked police car would inspire more careful driving for a time. Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly sufficed in that regard. Of course, an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.". This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.

The Court acknowledged this situation was a "close call," but agreed that "under the totality of the circumstances," the "indicia of reliability" was enough to find reasonable suspicion to justify the investigative stop.

The Supreme Court upheld California's ruling.

42 U.S.C. §1983 – USE OF FORCE

Tolan v. Cotton, 134 S.Ct. 1861 (2014)
Decided May 5, 2014

FACTS: On December 31, 2008, Officer Edwards (Bellaire, TX) was on patrol. At around 2 p.m., he noticed a black SUV turn onto a residential street and park; two men, Tolan and Cooper, who were actually cousins, got out. Edwards keyed in the license number on his MDT but keyed it in incorrectly (one number different). Coincidentally, that incorrect plate was registered to a vehicle of the same make and color, and it was, in fact, listed as stolen. Immediately, the computer system notified other officers that Edwards was with a stolen vehicle.

Edwards got out and ordered both men to the ground. He accused them of stealing the car, to which Tolan said it was his car. Apparently Tolan complied with Officer Edwards' order to lie on the ground, but Cooper did not. Tolan's parents emerged, who lived at the house; his father attempted "to keep the misunderstanding from escalating into something more" and told Cooper to lie down and both to "say nothing." Edwards told the Tolans what he suspected and Tolan's father identified his son and his nephew. His mother told them that the vehicle belonged to the family. Eventually Sgt. Cotton arrived – he also had his firearm out. Tolan's mother, still objecting to the situation, was ordered to stand against the garage door, to which she further complained.

At this point, it was alleged, Cotton "grabbed her arm and slammed her against the garage door with such force that she fell to the ground," leaving bruises that lasted for days. (Cotton testified that he escorted her to the garage and that she "flipped her arm up and told her to get his hands off her.") Tolan, allegedly, seeing his mother pushed, rose up to either his knees or his feet. He told the officer to "get his f***ing hands off my mom." Sgt. Cotton then turned and fired three shots at Tolan, striking him once in the chest, "collapsing his right lung and piercing his liver." Although

Tolan survived, the injury ended his "budding professional baseball career and causes him to experience pain on a daily basis."[28]

Cotton was charged with, but acquitted, of aggravated assault in the shooting. Cooper, Tolan and Tolan's parents filed suit against Stg. Cotton for excessive force. Upon motion, the District Court granted summary judgment in Cotton's favor, finding the force not unreasonable. Upon appeal, the Fifth Circuit Court of Appeals affirmed, holding that even if it did violate the Fourth Amendment, he was entitled to qualified immunity because Cotton "did not violate a clearly established right."

The Tolans and Cooper requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a court required to analyze the evidence in a summary judgment case in the light most favorable to the plaintiff?

HOLDING: Yes

DISCUSSION: The Court that such questions of qualified immunity require a "two-pronged inquiry." First, the Court must, using facts most favorable to the plaintiff, decide whether the "officer's conduct violated a federal right"[29] – in this case, the Fourth Amendment.

The second prong is "whether the right in question was 'clearly established' at the time of the violation.[30] Although the Court may decide these two prongs in any order, it "may not resolve genuine issues of fact in favor of the party seeking summary judgment."[31] This is the role of a judge in a summary judgment motion, which is only appropriate if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."

In use of force cases, courts are instructed to "define the 'clearly established' right at issue on the basis of the 'specific context of the case.'" In this case, however, the Fifth Circuit did not analyze the evidence "in the light most favorable to Tolan with respect to the central facts of this case." The Court looked to several points in which there was material conflict, such as the amount of light at the scene, Tolan's mother's demeanor, and the nature of Tolan's statement and whether it was threatening. Critically, too, was the characterization of Tolan's movements just prior to the shooting – and whether he was on his knees or his feet – as Tolan emphasized he was not getting up or approaching.

The Court came to the "inescapable conclusion" that the lower courts did not properly consider key evidence. The Court continued:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial reasons.

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[28] Tolan's father, Bobby, had a long career in Major League Baseball, playing for a number of teams.
[29] Saucier v. Katz, 533 U.S. 194 (2001).
[30] Hope v. Pelzer, 536 U.S. 730 (2002).
[31] Pearson v. Callahan, 555 U.S. 223 (2009); Brousseau v. Haugen, 543 U.S. 194 (2004).

Applying that principle, the trial court was obligated to acknowledge and credit Tolan's evidence that was in conflict with that provided by Cotton. The Court did not express any view at this point "as to whether Cotton's actions violated clearly established law." The Court vacated the Fifth Circuit's judgment and remanded it back, so that Tolan's evidence could be properly credited and weighted.

TRIAL PROCEDURE – DOUBLE JEOPARDY

Martinez v. Illinois, 135 S.Ct. 2070 (2014)
Decided May 27, 2014

FACTS: In August, 2006, Martinez was indicted on charges of aggravated battery and mob action against Binion and Scott. For some four years, however, the case stalled, mostly due to delays caused by Martinez. Finally, on July 20, 2009, in the face of a pending trial date on August 3, the State moved for a continuance because it could not locate Binion and Scott. Subpoenas for the pair were issued and the case continued to September 28. Still unable to find the two men, another continuance and then another was requested by the State and given by the trial court. Finally, on March 29, another continuance was granted, apparently Binion and Scott were present, and the two men were ordered to appear on May 10, with a trial date set for May 17.

On May 17, "Binion and Scott were again nowhere to be found." The State asked for a brief continuance and the trial court offered to delay swearing in the jurors until the entire panel was present. At that point, the State would have the choice of having the jury sworn or dismissing the case. Binion and Scott still not arriving, the trial court offered to call the other cases on the docket and delay swearing in the jury for a bit longer. When all delays had run out, and Binion and Scott still not being present, the State moved for yet another continuance. The trial court denied the motion, noting that the case had been ongoing for five years and that the two witnesses "are well known in Elgin, both are convicted felons." Further, it stated that "one would believe that the Elgin Police Department would know their whereabouts." The trial court offered to issue "body writs[32]" for the pair and that the state "might want to send the police out to find these two gentlemen." The trial court noted that there were a total of 12 witnesses on the state's list and that it could proceed with the witnesses present in anticipation of the missing pair being located and brought to court.

The trial court brought in the jury and gave it the oath. Upon directing the prosecution to proceed, the prosecutor stated that "the State is not participating in this case." After several other back and forth discussions, the defense moved for acquittal, which the trial court granted. The State then appealed, arguing that it should have been granted a continuance. The Illinois appellate court agreed that jeopardy had not attached and that the continuance should have been granted. The Illinois Supreme Court affirmed.

Martinez requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the swearing in of the jury signal the start of a trial, trigging the Double Jeopardy Clause?

[32] In Kentucky, such writs might take the form of a "Forthwith Order of Arrest" or a "Capias Warrant."

HOLDING: Yes

DISCUSSION: The Court began by nothing that "there are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'"[33] In Downum v. U.S., the Court had held that case "pinpointed the state in a jury trial when jeopardy attaches, and [it] has since been understood as explicitly authority for the proposition that jeopardy attaches when the jury is empaneled and sworn."[34] Jeopardy attaches when a defendant is "put to trial" and that occurs when the jury is "empaneled and sworn."[35]

Although the Court agreed that Martinez was subjected to jeopardy, that was not the end of the matter. The Court then looked to whether the case "ended in such a manner that the defendant may not be retried." In this case, the Court found no doubt that was the case – as he was acquitted of the charged offenses. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal … could not be reviewed … without putting [a defendant] twice in jeopardy, and thereby violating the Constitution."[36] In this case, the Court ruled that the prosecution had failed to prove its case, acquitting Martinez. The Court had tried to delay the process as long as possible but in the end, when the prosecutor refused to dismiss the case, the Court was forced to do so in the only way possible to it, by acquitting Martinez.[37]

The Court reversed the decision of the Supreme Court of Illinois and remanded the case.

42 U.S.C. §1983 – USE OF FORCE

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014)
Decided May 27, 2014

FACTS: On July 18, 2004, near midnight, Lt. Forthman (West Memphis, AR, PD) pulled over a vehicle that had only one headlight. Rickard was driving; Allen was the passenger. The officer noticed that there was a large (basketball or head-sized) indentation in the windshield of Rickard's car. He asked Rickard if he'd been drinking, which Rickard denied. Rickard did not produce an OL so the officer asked him to step out of the vehicle. Instead, Rickard "sped away." Lt. Forthman gave chase, joined by Sgt. Plumhoff and Officers Evans, Ellis, Galtelli and Gardner. They tried a "rolling roadblock" to stop him, but were unsuccessful. The vehicles sped toward Memphis, TN, swerving through traffic at speeds in excess of 100 mph. They passed a number of vehicles during the chase.

Rickard exited the expressway in Memphis and shortly afterward, executed a sharp turn that caused him to impact Evans' cruiser. As a result, Rickard's car spun out and struck Plumhoff's cruiser. "Now in danger of being cornered, Rickard put his car into reverse 'in an attempt to escape.'" Evans and Plumhoff approached on foot, and "Evans, gun in hand, pounded on the passenger-side window." At some point, Rickard struck yet another cruiser. Even though he was flush against

[33] Crist v. Bretz, 437 U. S. 28 (1978).
[34] 372 U. S. 734 [(1963)],
[35] Serfass v. U.S., 420 U. S. 377 (1975).
[36] U.S. v. Martin Linen Supply Co., 430 U. S. 564 (1977);
[37] In a footnote, the Court acknowledged that jeopardy may still have attached, however, and a retrial barred.

that cruiser's bumper, he was accelerating and the car was rocking back and forth. Plumhoff fired three shots into Rickard's car; all the while Rickard was reversing in an arc and fleeing down the street. During the turn, Rickard's actions forced Ellis to jump out of the way. Gardner and Galtelli also fired at Rickard's car, a total of 12 shots. "Rickard then lost control of the car and crashed into a building." Both occupants, Rickard and Allen, "died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase."

Rickard's daughter, Whitne, filed suit under 42 U.S.C. §1983 against the officers, the West Memphis mayor and the police chief, alleging excessive force. The officers moved for summary judgment under qualified immunity but were denied by the Sixth Circuit Court of Appeals. An appellate panel ruled that the officers' actions violated the Fourth Amendment and upheld the denial. The officers requested certiorari and the U.S.Supreme Court granted review.

ISSUE: Is using deadly force to end a dangerous, high speed pursuit, Constitutional?

HOLDING: Yes

DISCUSSION: The Court noted that in this case, the officers acknowledged that they shot Rickard but contended that "their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law."

> Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; decided legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

The officers argued two separate points – that "they did not violate Rickard's Fourth Amendment rights and that, in any event, their conduct did not violate any Fourth Amendment rule that was clearly established at the time of the events in question." Under Saucier v. Katz, the Court had ruled that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged," that that was modified somewhat in Pearson.[38] In Pearson, the Court noted that the Saucier procedure was beneficial, but need not be followed rigidly. In the case at bar, the Court began its evaluation "with the question whether the officers' conduct violated the Fourth Amendment, finding that to be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense."

The Court began:

> A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard.[39] In Graham, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth

[38] 533 U.S. 194 (2001); Pearson v. Callahan, 555 U.S. 223 (2009).
[39] See Graham v. Connor, 490 U. S. 386 (1989); Tennessee v. Garner, 471 U. S. 1 (1985).

Amendment interests against the countervailing governmental interests at stake." The inquiry requires analyzing the totality of the circumstances.

Using the usual precepts of Graham, the Court noted that it must analyze this situation "from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." This allows "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

The estate executor made two arguments - that the Fourth Amendment did not allow the officers to use deadly force to end the chase and that even if they could fire their weapons at the fleeing vehicle, they "went too far when they fired as many rounds as they did."

The Court looked to Scott v. Harris, first, which held that ""police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[40] The Court found "no basis for reaching a different conclusion here." The record disproved the claim that the chase was over at the time the shooting ended, when in fact, given that Rickard was still actively trying to escape the scene, it was not. The Court agreed that "all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." Further, "Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path— underscores the point." The Court held that it was "beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in Scott, the police acted reasonably in using deadly force to end that risk."

With respect to the number of rounds fired, the Court noted that "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." During the ten seconds encompassing the time the shots were fired, "Rickard never abandoned his attempt to flee." He managed to drive away and only stopped when he crashed. This was not a situation where the officers "had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened."

Even though Allen, as his passenger, was put at risk, the Court noted this case was not intended to address that concern. Her "presence in the car cannot enhance Rickard's Fourth Amendment rights" and "after all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit."

Although the ruling in that case precluded the denial of summary judgment, the Court also noted that its decision on Brosseau v. Haugen[41] demonstrated "that no clearly established law precluded [the officers'] conduct at the time in question." Such cases depend "very much on the facts of each case." Between the time the events occurred in Brosseau and the events in this case, approximately five years, there was no showing that there had been any groundswell of case law that would have

[40] 550 U.S. 372 (2007)
[41] 543 U.S. 194 (2004)

given the officers warning that their conduct, using deadly force to end a high-speed car chase, was unreasonable

The Court held that the officers were entitled to summary judgment and reversed the decision of the Sixth Circuit Court of Appeals, remanding the case for further proceedings.

FEDERAL FIREARMS LAW

Abramski v. U.S., 134 S.Ct. 2258 (2014)
Decided June 16, 2014

FACTS: Abramski offered to buy a handgun for his uncle, Alvarez from a licensed dealer.[42] Alvarez sent him a check for the purchase, noting, in the memo line, that it was for a "Glock 19 handgun." Abramski went to Town Police Supply, where he filled out a Form 4473. He falsely checked that he was the "actual transferee/buyer" although "according to the form's clear definition, he was not." He also signed the certification in which he acknowledged that falsely answering the question was a federal crime. When his named cleared the background check, he purchased the weapon. Abramski deposited the check, gave the gun to Alvarez and received a receipt. Unfortunately, however, "federal agents found that receipt while executing a search warrant at Abramski's home after he became a suspect in a different crime." He was charged with violating 18 U.S.C. §§922(a)(6) and 924(a)(1)(A) by falsely affirming that he was the actual buyer of the handgun. Abramski argued for dismissal on the basis that his misrepresentation was not material because in fact, Alvarez could have lawfully bought it himself. The District Court denied his motion. Abramski took a conditional guilty plea and appealed. The Fourth Circuit Court of Appeals affirmed the convictions, finding that the identity of the actual purchaser was always material under federal law.

Abramski requested certiorari and the U.S. Supreme Court granted review.

ISSUE: May a weapon be purchased, under federal law, by a "straw" purchaser?

HOLDING: No

DISCUSSION: Abramski's primary argument was that federal gun law "simply does not care about arrangements involving straw purchasers" so long as that person, standing at the counter, is legally eligible to own a gun. The Court agreed that the language of the statute did not specifically address the concept of a straw purchaser. To answer that question, the Court looked to "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history and purpose.'"[43]

The Court agreed that:

[42]Because Abramski had previously been a police office, and retained an ID card even though he'd been fired, he thought he could get a deal.
[43] Maricich v. Spears, 570 U.S. – (2013).

> All those tools of divining meaning – not to mention common sense, which is a fortunate (though not inevitable) side-benefit of construing statutory terms fairly – demonstrate that 922, in regulating licensed dealers' gun sales, look through the straw to the actual buyer.

The Court noted that the whole purpose of the core provisions of the law was to "verify a would-be gun purchaser's identity and check on his background" and that the relevant information be kept in the dealer's records. No part of that works if the statute ignores straw purchases, which would make the process simply an empty formality. Without the ability to check the information for the "actual" purchases, the provisions of the law "would be utterly ineffectual, because the identification and background check would be of the wrong person." Further, by storing the name of the purchases, law enforcement officers might be able to find a gun at a crime scene and "they can trace it to the buyer and consider him as a suspect." It also allows dealers to spot suspicious purchasing practices. The Court noted that "those provisions can serve their objective only if the records point to the person who took actual control of the gun(s). At most, they may find only an intermediary, if those provisions are ignored.

Further:

> Abramski's view would thus render the required records close to useless for aiding law enforcement; Putting true numbskulls to one side, anyone purchasing a gun for criminal purposes would avoid leaving a paper trail by the simple expedient of hiring a straw."

Abramski argued that to find otherwise, a later resale of a weapon to a private party, or the purchase of a firearm intended to be a gift for another, would also not be permitted. However, the Court agreed that the "secondary market for guns" was left "largely untouched" by Congress. That "choice (like pretty much everything Congress does) was surely a result of compromise." The court noted that "the individual who sends a straw to a gun store to buy a firearm is transacting with the dealer, in every way but the most formal; and that distinguishes such a person from one who buys a gun, or receives a gun as a gift, from a private party." Even though there is little control in the secondary firearms market, the Court found "no reason to gut the robust measures Congress enacted at the point of sale."

The Court concluded:

> No piece of information is more important under federal firearms law than the identity of a gun's purchaser – the person who acquires a gun as a result of a transaction with a licensed dealer. Had Abramski admitted that he was not that purchaser, but merely a straw – that he was asking the dealer to verify the identity of, and run a background check on, the wrong individual – the sale here could not have gone forward. That makes Abramski's misrepresentation on Question 11.a. material under §922(a)(6). And because that statement pertained to information that a dealer must keep in its permanent records under the firearms law. Abramski's answer to Question 11.a. also violated §924(a)(1)(A).

The decision of the U.S. Fourth Circuit was affirmed

FIRST AMENDMENT

Lane v. Franks, --- U.S. --- (2014)
Decided June 19, 2014

FACTS: In 2006, Lane was hired to oversee a program (CITY) operated by the Central Alabama Community College (CACC). At the time, the program faced serious financial concerns and Lane did a comprehensive audit. He learned that one employee, Schmitz, who was also a state legislator, was not reporting to her office at the program to perform her duties. He was not successful in changing her conduct, so he went to the CACC president and attorney, who warned him against the political ramifications of firing Schmitz. He went back to Schmitz and admonished her to "show up to the … office to serve as a counselor." She refused and was promptly fired. Schmitz then told another employee that she would get back at Lane for firing her. Schmitz's termination drew a great deal of attention, especially from the FBI.[44] Lane testified before a federal grand jury and Schmitz was indicted for theft and mail fraud. Lane again testified at two subsequent trials and, ultimately, Schmitz was convicted.

During that time, CITY experienced budget shortfalls. Franks, the new president of CACC, decided to lay off 29 program employees, including Lane, but ultimately rescinded all but two of those firings – one of the two being Lane. (Franks later stated he considered Lane to be in a different category than the rest of the employees, as he was the director.)

Lane sued Franks[45] under 42 U.S.C. §1983, arguing that "Franks had violated the First Amendment by firing him in retaliation for his testimony against Schmitz." The U.S. District Court ruled in favor of Franks, finding that although there were questions as to Franks' "true motivation" for the termination, that Franks would not have had reason to know that Lane's speech was protected. The District Court ruled that because the substance of Lane's testimony involved information he'd learned as part of his work, his speech might be considered "part of his official job duties and not made as a citizen on a matter of public concern."

Lane appealed. The Eleventh Circuit Court of Appeals affirmed, relying, as did the trial court, on Garcetti v. Ceballos.[46] Lane filed for certiorari and the U.S. Supreme Court granted review.

ISSUE: Is testifying truthfully as to matters learned in the course of one's employment protected speech?

HOLDING: Yes

DISCUSSION: The Court began, noting that "speech by citizens on matters of public concern lies at the heart of the First Amendment, which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[47]

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[44] The program had federal funding.
[45] Franks resigned during the lawsuit, and Burrow, the new president, was substituted as the official defendant.
[46] 547 U.S. 410 (2006).
[47] Roth v. U.S. , 354 U.S. 476 (1957).

Further:

> This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights."[48] There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.[49] The interest at state is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.[50]

In Pickering v. Board of Education, however, the Court had given government employers some ability to control the speech and actions of its employees. It created a balancing test to analyze "whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees." If the speech involves a matter of public, rather than private, concern, the speech must be permitted. However, under Garcetti, the Court developed an additional two-step inquiry:

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. In short, in Garcetti, the Court ruled that when a public employee speaks as to their official duties, they "are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline."

The Court then moved on to the question raised by Lane, "whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities." Clearly his testimony concerned a matter of public concern and "truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes." This remains the case "even when the testimony relates to his public employment or concerns information learned during that employment." The Court noted that "sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." Apart from any employer obligations, the Court agreed, the employee has a clear obligation "to speak the truth."

Court precedent has "recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." In Roe, the court observed that Government

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[48] Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U. S. 589 (1967); Pickering v. Board of Education, 391 U. S. 563 (1968; Connick v. Myers, 461 U. S. 138 (1983).
[49] Waters v. Churchill, 511 U.S. 661 (1994).
[50] San Diego v. Roe, 543 U.S. 77 (2004).

employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large." It is even more critical in the context of this case, public corruption, which often require fellow public employees to testify.

The Court continued:

> It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials – speech by public employees regarding information learned through their employment – may never form the basis for a First Amendment retaliation claim. Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.

The Court agreed that Lane's speech was "speech as a citizen." Further, it also clearly involved a matter of public concern, as defined as speech that can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[51] The analysis turns on the "content, form, and context" of the speech. The speech in this case, which was sworn testimony, was fortified by being made "under oath" and under circumstances that had "the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others."[52]

The final inquiry was whether CACC had "an adequate justification for treating the employee differently from any other member of the public" based on its internal needs. Here, however, the CACC's "side of the Pickering scale is entirely empty," there was simply no "government interest that tips the balance in their favor." Lane's testimony was not false or erroneous, and it did not disclose any "sensitive, confidential, or privileged information." The Court ruled that he was entitled to First Amendment protection.

The Court did, however, agreed that Lane's claims against Franks, as an individual, must be dismissed under qualified immunity, as the matter had not been clearly established at the time Franks terminated Lane. This did not, however, resolve the claim against the new president of CACC, who represented the position (president) in her official capacity.

The U.S. Supreme Court affirmed the decision of the Eleventh Circuit with respect to the individual claim against Franks, but reversed the dismissal of the remaining claims. The court remanded the case for further proceedings.

FEDERAL LAW – BANK FRAUD

Loughrin v. U.S., --- U.S. --- (2014)
Decided June 23, 2014

[51] Snyder v. Phelps, 562 U.S. – (2011).
[52] U.S. v. Alvarez, 567 U.S --- (2012).

FACTS: Pretending to be a missionary, Loughrin went door-to-door in a Salt Lake City neighborhood. He "rifled through residential mailboxes and stole any checks he found." In some cases, he was able to alter the checks to remove existing writing and filled them out "as he wanted," in other cases, he "did nothing more than cross out the name of the original payee and add another." On at least one occasion, he was "lucky enough to stumble upon and blank check," whereupon he filled it out and forced the account holder's name. As many as six were cashed through Target, and he would buy merchandise, then return and exchange the goods for cash.

Each of the checks cashed at Target when through a federally insured bank. In three instances, Target recognized the checks as frauds and did not submit them for payment, three others were cashed. In at least one instance, the bank declined payment, the evidence was unclear as to what happened with the other two.

Eventually Loughrin was apprehended and charged with six counts of bank fraud, under 18 U.S.C. §1344. He was convicted and appealed. The Tenth Circuit Court of Appeals affirmed. Loughrin requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is the presentation of a fraudulent bank check to a merchant bank fraud?

HOLDING: Yes

DISCUSSION: The question before the Court was "whether the Government must prove yet another element; that the defendant intended to defraud a bank." In other words, more than just intending to get money, that it was necessary to specifically intend to deceive a bank. Loughrin argued that he only intended to deceive Target, not the bank.

The Court, however, disagreed, finding, that Loughrin's crime occurred by his making of false statements, "in the form of forged and altered checks, that a merchant would, in the ordinary course of business, forward to a bank for payment." As such, the Court agreed, his conviction was proper.

SEARCH & SEIZURE – CELL PHONE

Riley v. California / U.S. v. Wurie, --- U.S. --- (2014)
Decided June 25, 2014

FACTS: In the first case, Riley was stopped in Los Angeles police for expired registration tags, it was then learned that his license was also suspended. His car was impounded and searched pursuant to the agency's inventory policy. Two handguns were found, and Riley was then arrested for the concealed weapons. Riley was searched and items associated with gang activity were found. The officer seized Riley's smart phone from his pocket, "accessed information on the phone and noticed that some words (presumably in text messages or a contacts list)" also suggested involvement in gang activity.

Two hours later, a detective specializing in gangs "further examined the contents of the phone," looking for potential evidence such as photos or videos. He found, in particular, a photo of Riley standing in front of a vehicle suspected of being involved in a recent shooting. Riley was charged in

that shooting, with enhancements for committing the crimes to benefit a criminal gang. Riley moved to suppress the evidence obtained from the phone, which was denied. Riley was convicted and the California appellate courts affirmed his conviction.

In the second case, Wurie was observed by Boston police during routine surveillance making an "apparent drug sale from a car." He was arrested, taken to the station and two phones were seized. One, a "flip phone," was 'repeatedly receiving calls" from a number identified on the phone's external screen as "my home." They opened it and saw, as the phone's wallpaper, a woman and a baby. They were able to track the number to an apartment building. There, they saw that Wurie's name was on the mailbox and through a window, saw a woman who appeared to be the one in the photo. They secured the apartment, obtained a search warrant and eventually found drugs, weapons and cash. Wurie, a felon, was charged with distribution of drugs and possession of the firearms. He moved for suppression and was denied. He was convicted but upon appeal, the First Circuit Court of Appeals reversed his conviction.

In both cases certiorari was requested and the U.S. Supreme Court granted review.

ISSUE: May a cell phone be routinely searched incident to arrest?

HOLDING: No

DISCUSSION: The Court noted that both cases "concern the reasonableness of a warrantless search incident to a lawful arrest." In Weeks v. U.S., the Court had ruled that it had long been recognized that it was permissible to "search the person of the accused when legally arrested to discover the seize the fruits or evidences of crime."[53] Although usually called an exception, in fact, the Court agreed, that was "something of a misnomer," since "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." Since that time, the scope of such searches has been debated, with three specific cases illustrating the parameters of the argument.

In Chimel v. California, the Court "laid the groundwork for most of the existing search incident to arrest doctrine."[54] In Chimel, the Court agreed it was reasonable to search the person to remove any weapons or items that might be used to aid in an escape. It further noted it was "entirely reasonable for the arresting officer to search for and seize any evidence … to prevent its concealment or destruction." In U.S. v. Robinson, the court applied the rule to the contents of a cigarette package found on the person of an arrested subject and ruled that a "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."[55] That was clarified in U.S. v. Chadwick, however, which ruled that a locked footlocker in the possession of the arrested subject could not be searched incident to arrest.[56] Finally, in Arizona v. Gant, the Court

[53] 232 U.S. 383 (1914)
[54] 395 U. S. 752 (1969)
[55] 414 U. S. 218 (1973)
[56] 433 U. S. 1 (1977)

emphasized that "concerns for officer safety and evidence preservation underlie the search incident to arrest exception."[57]

Moving to the specific issue of "how the search incident to arrest doctrine applies to modern cell phones," the Court noted that they "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Although such phones were unknown just ten years ago, now, it noted "a significant majority of American adults now own such phones." Even though Wurie's was a "less sophisticated" phone than Riley's, that model had only "been around for less than 15 years." Both were based on technology that was "nearly inconceivable" when Chimel and Robinson were decided.

The Court noted that balancing tests created in earlier cases simply did not apply 'with respect to digital content on cell phones" and found little to no risk of harm or destruction of evidence "when the search is of digital data." Although an arrested subject loses a great deal of privacy rights, "cell phones … place vast quantities of personal information literally in the hands of individuals."

Further, the Court agreed:

> Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Although the Government in both cases suggested that there might be indirect ways that searching the phone might protect officers, the Court found that there had been no proof in either case that such "concerns are based on actual experience.' To the extent that a particular case might have such an issue arise, the Court found it to be "better addressed" by treating it as a specifically articulated exigency based upon specific facts.

In both cases, the Government focused primarily, however, on the destruction of evidence prong. In both cases, it was argued that:

> … that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing").

In addition, it argued that encryption is a security feature in some phones, used along with passwords/codes. When locked, the information is inaccessible unless the password is known. In

[57] 556 U.S.332 (2009); A further exception allowed under Gant, searching for evidence related to the crime of arrest, stemmed from "circumstances unique to the vehicle context."

the case of remote wiping, the primary concern is not with the arrested subject, who cannot access the phone, but with third parties. However, the Court noted that it had been given no evidence that "either problem is prevalent" – as it had been provided with "only a couple of anecdotal examples of remote wiping triggered by an arrest.' With respect to searching a phone before the password triggers the phone to lock down, the Court noted that law enforcement officers are "very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity."

> Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

The Court noted that remote wiping can be prevented by disconnecting the phone from the network, by turning it off, removing the battery or placing the phone in a Faraday bag to isolate it from signals. While this is not necessarily a "complete answer to the problem," it is, at least a reasonable response, already in use by some law enforcement agencies. The Court agreed, however that if there truly is an exigent circumstances, especially one with life-or-death consequences, "they may be able to rely on exigent circumstances to search the phone immediately."[58] Or, if the phone is unlocked, secure it so that it does not automatically lock.[59] The theoretical threat of a remote wipe of the data, alone, is not sufficient, however, to be considered an exigent circumstances, particularly since it can be, as a rule, prevented by alternative means.

The Court agreed that although an arrested subject has "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." Despite the assertion that a search of a cell phone, in the context of an arrest, is "materially indistinguishable" from the search of other items in their possession.

The Court continued:

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they

[58] Missouri v. McNeely, 133 S.Ct. 1552 (2013)
[59] See Illinois v. McArthur. 531 U.S. 326 (2001).

> have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in Chadwick, rather than a container the size of the cigarette package in Robinson.

In addition, a cell phone can contain "many distinct types of information" that together can be used to reconstruct "the sum of an individual's life." The Court contrasted a note with a person's phone number to a "record of all … communications" – and in some cases, the content of that communications, with that same individual, as might be found on a cell phone. Normally, a person would not carry about "sensitive personal information" every day, but now, that is done routinely. The Court noted that the vast majority of adults 'keep on their person a digital record" of their lives, from the "mundane to the intimate." Not only in quantity is it different, but also in quality – for example, an Internet browsing history, historic location data, various apps that might suggest a person's private life.

In U.S. v. Kirschenblatt, it was observed that : it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him."[60] However, "If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."

To further complicate matters, a cell phone may be used to access a wealth of data located elsewhere, in what is called "cloud computing." In fact, it may not even be readily known whether a particular piece of data is one the phone itself … or located elsewhere and simply being access through the phone. Arguing that such data would be access with would be analogous to "finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house."

The Court noted that agencies should, of course have protocols, but that "the Founders did not fight a Revolution to gain the right to government agency protocols." All of the options argued before the court were found to be unfeasible and unacceptable, The Court emphasized. However, that it was not holding that a cell phone is immune from search, only that a warrant will generally be required prior to a search, unless another recognized exigent circumstance applies.

The Court concluded:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
>
> …

[60] 16 F.2d 202 (2nd Cir. 1926).

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.

The Court reversed the judgment in Riley and affirmed the judgment in Wurie.

FIRST AMENDMENT

McCullen v. Coakley, --- U.S. --- (2014)
Decided June 26, 2014

FACTS: In 2000, Massachusetts enacted a state law "designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed." That law established a buffer zone of an 18 foot radius around entrances and driveways. Anyone could come inside that area, but they could not approach another within six feet without consent to give them a leaflet or handbill, or to counsel or educate them. A separate provision prohibited blocking access to the location. In 2007, the statute was being considered inadequate to address problems that were occurring, in particular, that protestors were violating the buffer zone regularly and congregating in the area. Boston police had made only a few arrests, however, and that when prosecutions did occur, they were unsuccessful, because deciding whether a person had approached another intentionally was virtually impossible in the crowded space. In response, Massachusetts amended the statute, creating instead a 35 foot fixed buffer zone "from which individuals are categorically excluded." (Only those working at the clinic, patients, public responders and utility workers and those using the sidewalks to reach other destinations were permitted inside the zone.)

The individuals who stand outside such clinics include actual protestors as well as those who engage in "sidewalk counseling," offering alternatives to abortion and assistance. McCullen, the primary petitioner in this case, falls into the latter category. As a result of the 2007 statute, McCullen was no longer able to stand on a 56-foot length of public sidewalk in front of the clinic. Other petitioners, at two other clinics, were prohibited from the one area of the public sidewalk where they might, in fact, be able to influence those coming to the clinic. (In those cases, those coming to the clinics would enter through a private driveway and parking in a private lot, areas they could not enter.) All argue that since the 2007 law took effect, they "have had many fewer conversations and distributed many fewer leaflets." In a related issue, it was noted that the clinics were permitted to hire escorts, and that the escorts would thwart their attempts to talk to the patients by blocking access physically and verbally.

In 2008, McCullen (and the others) sought an injunction; The District Court denied it and the First Circuit Court of Appeals affirmed. After additional legal proceedings, McCullen petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: May a fixed buffer zone around an abortion clinic (or other facility) prohibit activity on a public sidewalk or other traditional public fora?

HOLDING: No

DISCUSSION: The Court noted that the very language of the statute limited access to the public sidewalks, areas that occupy a "special position in terms of First Amendment protection."[61] These public areas, labeled "traditional public fora" – have since time immemorial "been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts be- tween citizens, and discussing public questions."' The Court noted that such areas "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." In all other means of communication, the hearer can turn away and tune out the message – but not so on the public streets and sidewalk Historically, the court had held that any attempt to restrict speech in that area must be very, very limited, although the government is permitted to "impose reasonable restrictions on the time, place or manner of the speech, so long as the restriction is narrowly drawn and content-neutral.

In this case, McCullen argued that virtually all of the speech that is affected by the law relates to abortion, to which the Court disagreed, as it did not mention the content of speech on its face, and in fact, its primarily purpose was public safety to avoid unsafe interactions between the two sides of the issue. The court noted that "obstructed access and congested sidewalks are problems no matter what caused them," and "compromise public safety." The statute was limited to such locations because there was only a regular problem at such locations.

McCullen also argued that the exemptions to the statute serve to favor one side of the debate over the other. With respect to the speech of the escorts, the Court agreed that if it went beyond the scope of their employment, it would violate the express language of the statute, it might constitute selective enforcement, but that claim was not before the Court.

Finding the case to not be either content nor viewpoint based, it moved on to analyze it under the strict scrutiny standard. The court agreed that although it was legitimate to be concerned about public safety, that the "buffer zones impose serious burdens" on speech by carving out and designating as prohibited significant portions of public sidewalks. McCullen noted that she was forced to raise her voice to be heard by those within that area, which was at odds to the message she wanted to convey. McCullen and the others were forced to stay so far back that by the time they realized an individual was a patient, it was too late to engage in face to face conversation or pass on a leaflet before that individual entered the prohibited zone. The Court specifically noted that the alternatives offered by the Government, chanting and showing signs, missed the point, as McCullen and the others are not protestors. They believe that their objective can only be met by "personal, caring, consensual conversations." In all three locations, they are not seeking a right to enter private property, but only to stand on the public sidewalks.

The Court agreed that the "buffer zones burden substantially more speech than necessary" to achieve the state's interests. The state already has a law that criminalizes harassment and related

[61] U.S. v. Grace, 461 U. S. 171(1983).

conduct. Specific obstructions, too, can be addressed through existing local ordinances that prohibit impeding free travel on public rights-of-way. Injunctive relief against a particular, offending individual is also a valid option, as it "focuses on the precise individuals and the precise conduct causing a particular problem." Further, since it was acknowledged that there were only a few locations, and that the areas and the parties were well known to local law enforcement, the Court found no reason that they could not take specific action against individuals flouting the law, if necessary.

Further, although agreed that a fixed zone makes it easier for law enforcement, "that is not enough to satisfy the First Amendment" and the need to narrowly tailor such restrictions. Also, the court noted it did not "think that showing intentional obstruction is nearly so difficult in this context as [the state] suggest[s]. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional." Since a significant police presence has routinely been in place at these locations, detecting lawbreakers should not be difficult.

The Court concluded that sidewalks and other traditional public fora "have hosted discussions about the issues of the day throughout history." Taking the "extreme step of closing a substantial portion of a traditional public forum to all speakers," "without seriously addressing the problem through alternatives," is not consistent with the First Amendment.

The First Circuit's decision is reversed and the case remanded.